

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
Amendment of Section 73.202(b),) MB Docket No. 04-299
Table of Allotments,) RM-10958
FM Broadcast Stations.)
(Refugio, Sinton, and Taft, Texas))

NOTICE OF PROPOSED RULE MAKING

Adopted: August 10, 2004

Released: August 12, 2004

Comment date: October 4, 2004
Reply comment date: October 19, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rulemaking filed jointly by Amigo Radio, Ltd. licensee of Station KOUL(FM), Sinton, Texas, and Pacific Broadcasting of Missouri LLC, licensee of Station KTKY(FM), Taft, Texas (jointly, "Petitioners"), requesting that we reallocate Channel 279C1 from Sinton to Refugio, Texas, and modify the license of Station KOUL(FM) to reflect the change of community. They also request that we modify the operating condition for Station KTKY(FM), Taft, Texas, to permit the station to commence program test authority on Channel 293C2 when Station KOUL(FM) commences program test authority at Refugio.1 Petitioners pledge to effectuate the change of community, if granted.

2. Petitioner filed its proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.2 In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.3

3. In support of their proposal, Petitioners first state that there is no question of community status for Refugio because the Commission has already allotted two channels to the community. Petitioners state that the reallocation would constitute a preferential arrangement of allotments because it would provide an operating service in Refugio, FM service in Sinton, and allow service to initiate in Taft. The reallocation does not require a change of transmitter site, and therefore no loss or gain area will be created.

1 An additional request, to reallocate vacant Channel 263A from Refugio, Texas, to Woodsboro, Texas as the community's first local aural transmission service, was withdrawn.

2 See 47 C.F.R. § 1.420(i); see also Change of Community R&O, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

3 The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], See Revision of FM Assignment Policies and Procedures, 90 FCC2d 88, 91 (1988).

4. Most importantly, Petitioners state that the reallocation would allow Station KTKY(FM) to fulfill its change of community from Refugio to Taft, which was granted in MM Docket No. 99-256.⁴ In that proceeding, a condition was placed on the operation of Station KTKY, prohibiting it from commencing operation in Taft until a new station begins operation at Refugio.⁵ Furthermore, subsequent to the *Report and Order* in MM Docket No. 99-256, Station KTKY lost its transmitter site to serve Refugio and has not been able to operate with its full facilities since then. Pacific has been denied its request to operate with special temporary authority at Taft using new facilities specified in its now-granted Taft construction permit.⁶ Petitioners state that the condition on Station KTKY's license has rendered it impossible for it to provide first local service to Taft in the foreseeable future because Channels 263A and 291A have yet to be auctioned, and this is an event which is outside their control.⁷ As stated earlier, Petitioners request, in the event the instant proposal is granted, to have the condition on Station KTKY's license modified to permit the station to commence program test authority on Channel 293C2 at Taft when Station KOUL(FM) commences program test authority at Refugio.⁸ We seek comment on this modification to the condition on Station KTKY's license.

5. We believe that the proposal warrants consideration because it would provide Refugio with an operating local station without depriving Sinton of its sole local transmission service.⁹ As stated above, in making this determination, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. Since neither community would be receiving its first local aural transmission service, our determination will be guided by Priority (4) of the allotment priorities. Refugio, 2000 U.S. Census population 2,941 persons, has two vacant channels and the reallocation would represent its third local service, but its first operating station. Sinton, 2000 U.S. Census population 5,676 persons, has three operating stations and will be reduced to two. We seek comment on this proposal under Priority (4) of the FM allotment priorities.

6. Channel 279C1 has been proposed to be reallocated at Refugio at Petitioners' proposed

⁴ See 15 FCC Rcd 8497 (2000).

⁵ That condition reads as follows: "Operation of Station KTKY on Channel 293C2 in Taft, Texas, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 263A or Channel 291A at Refugio, Texas, and activation of service has been initiated on Channel 263A or Channel 291A at Refugio." *Id.* at 8501.

⁶ See File No. BPH-20000613AAF; *Application for Pacific Broadcasting of LLC for Special Temporary Authority to Operate Station KTKY(FM), Refugio, Texas*, 18 FCC Rcd 2291 (2003) *aff'd on recon.* FCC 04-140 (released June 16, 2004 by the Commission).

⁷ Petitioners point out that Auction 37 has yet to be held, and once it is held, the successful bidder will have three years to construct.

⁸ Petitioners indicate that Station KTKY could begin providing a first local service to Taft "*immediately*" [emphasis in original] if the Commission modifies the condition on Station KTKY to permit the station to commence operation when Station KOUL commences operation in Refugio. However, we note that they also pledge to "file their respective applications for construction permit, construct the necessary facilities [once authorized], and commence program test authority," which could not be accomplished immediately. We also note that Amigo Radio will not be able to effectuate the proposed changes for Station KOUL immediately upon the effective date of a *Report and Order* granting the change of community from Sinton to Refugio, even though the nature of the proposal requires no construction. Every change of community, even if it requires no construction, requires the filing of a minor change construction permit application (Form 301) which must be granted, before the station can commence service pursuant to program test authority. See, e.g., *Glasgow and Bowling Green, Kentucky*, 19 FCC Rcd 8477 (2004).

⁹ Sinton will continue to receive local service from Stations KNCN(FM) and KDAE(AM)

site, 33.8 kilometers (21 miles) southwest of the community.¹⁰ Since this proposal is within 320 kilometers (199 miles) of the U.S.-Mexico border, concurrence of the Mexican government to the proposed allotments has been requested.

7. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, 47 C.F.R. Section 73.202(b), for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Refugio, Texas	263A, 291A,		263A, 279C1, 291A
Sinton, Texas	267C1, 279C1		267C1

8. The Commission’s authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached *Appendix* and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the *Appendix* before a channel will be allotted.

9. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments or counterproposals on or before October 4, 2004, and reply comments on or before October 19, 2004, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioners’ counsel, as follows:

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10. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission’s contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section

¹⁰ The coordinates for Channel 279C2 at Refugio are 28-02-07 NL and 97-26-11 WL.

73.202(b) of the Commission's rules.¹¹ This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

12. For further information concerning this proceeding, contact Victoria M. McCauley (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

¹¹ *See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend 47 C.F.R. §§ 73.202(b), 73.504 and 73.606(b).* 46 FR 11549 (February 9, 1981).

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments (*see* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; service. Pursuant to applicable procedures set out in 47 C.F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.